

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RANDY MCKEE and SHEILA  
MCKEE, husband and wife,

Plaintiffs,

v.

CHELAN COUNTY, a County existing  
under Washington law; CHELAN  
COUNTY SHERIFF'S OFFICE, a  
subdivision of Chelan County; and  
CHELAN COUNTY FIRE DISTRICT  
NO. 6, a fire district existing under  
Washington law,

Defendants.

No. 2:14-CV-0204-SMJ

**ORDER GRANTING DEFENDANT  
CHELAN COUNTY FIRE  
DISTRICT NO. 6'S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court, without oral argument, is Defendant Chelan County Fire District No. 6's Motion for Summary Judgment, ECF No. 15. Defendant Chelan County Fire District No. 6 seeks dismissal of Plaintiffs' claims, with prejudice, as to all matters against it. Plaintiffs oppose the motion. Having reviewed the pleadings and the file in this matter, the Court is fully informed and grants the motion.

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## I. BACKGROUND

### A. **Factual Background**<sup>1</sup>

On July 30, 2010, Defendant Chelan County Sherriff's Office (Sherriff's Office) dispatch received a 911 call regarding a fire in Nahahum Canyon, Chelan County, Washington. ECF No. 18-5 at 39. Defendant Chelan County Fire District No. 6's (Fire District) Chief Phil Mosher responded to a RiverCom dispatch report about the fire. ECF No. 16 at 6-7. Because Chief Mosher was first to respond to the fire, he was deemed "Incident Command." ECF No. 17 at 2-3. At 3:49 p.m., Chief Mosher observed two additional fires and radioed RiverCom to request the Sherriff's Office establish a roadblock at the bottom of Nahahum Canyon Road and to "[allow] no one up [Nahahum Canyon Road] unless fire units or aid." ECF No. 16 at 6.

At approximately 5:00 p.m., Plaintiff Randy McKee arrived at the sheriffs' roadblock and requested permission to pass and access his real property on Nahahum Canyon Road. ECF No. 26 at 2. Upon Plaintiff's request, Sheriff Sergeant Sisson radioed Chief Mosher and informed him of Mr. McKee's presence. ECF No. 27-1 at 11. Chief Mosher stated Mr. McKee should not be granted permission to pass the roadblock because "it was a critical time in the

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<sup>1</sup> In ruling on the motion for summary judgment, the Court has considered the facts and all reasonable inferences have been made in light most favorable to the party opposing the motion. *See Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015).

1 fire.” *Id.* The sheriffs denied Mr. McKee permission to pass the roadblock and  
2 instructed him to speak with the Washington State Department of Natural  
3 Resources (DNR), which had a command center at the Chelan County  
4 Fairgrounds. ECF No. 26 at 3.

5       Upon Mr. McKee’s arrival at the fairgrounds, DNR stated they were not in  
6 command of the Nahahum Canyon fire and that the Sheriff’s Office was instead  
7 responsible for the roadblock. *Id.* Mr. McKee returned to the roadblock but the  
8 sheriffs instructed him to return to DNR’s command center. Plaintiff returned to  
9 DNR, and was again instructed that the sheriff’s controlled the roadblock. *Id.* at 3-  
10 4. At approximately 5:45 p.m., Mr. McKee arrived at the roadblock a third time  
11 and “spoke with individuals, including several firefighters,” who told him the fire  
12 was south of his property. *Id.* at 4. At approximately 10:00 p.m., Mr. McKee  
13 learned the fire had breached his property. *Id.* Mr. McKee alleges he never spoke  
14 with Chief Mosher on the day of the fire. ECF No. 25 at 3-4. As a result of the  
15 fire, Plaintiffs suffered damage to their real property, an excavator, building  
16 materials, and other personal property. ECF No. 10 at 3.

17       Chief Mosher spoke with Sergeant Sisson about the instant lawsuit several  
18 times before 2013. ECF No. 31-1 at 8-9. One discussion occurred at Sergeant  
19 Sisson’s office. ECF No. 31-3 at 26. Other discussions may have occurred at Fire  
20 Chief meetings, Central Washington Fire Chief Meetings, or RiverCom

1 Operations Group meetings because the two often attended these meetings  
2 together. ECF No. 31-3 at 26. Chief Mosher also spoke with Chelan County's  
3 counsel in 2013 about the fire and roadblock. ECF No. 27 at 17.

4 Plaintiffs did not realize the Fire District was a relevant party to their claim  
5 until July 22, 2013, when Chelan County answered in an interrogatory that the  
6 Fire District called for the closure of Nahahum Canyon Road. ECF No. 28 at 3.

#### 7 **B. Procedural Background**

8 Plaintiffs filed the present action against Defendants Chelan County and  
9 Chelan County Sheriff's Office in the Superior Court of the State of Washington  
10 in Grant County on December 11, 2012. ECF No. 1 at 2. On March 13, 2014,  
11 Plaintiffs and Defendants Chelan County and Chelan County Sherriff's Office  
12 stipulated that Plaintiffs be able to amend their complaint and add Chelan County  
13 Fire District No. 6 as a defendant. ECF No. 2-4. Plaintiffs filed their first  
14 Amended Complaint on April 14, 2014. ECF No. 18-7. Plaintiffs served Chief  
15 Mosher with copies of the Summons and the Amended Complaint on May 20,  
16 2014. ECF No. 28. Defendants then removed the case to this Court for resolution  
17 of a federal question under 28 U.S.C. § 1331. ECF No. 1.

18 In the second Amended Complaint, Plaintiffs claim Defendants (1) failed to  
19 allow Plaintiffs access to their property owned in Chelan County to conduct fire  
20 prevention and suppression, causing property damage in violation of Chapter

1 47.28 RCW and Chapter 38.28A RCW; (2) acted negligently in denying Plaintiffs  
2 access to their property; and (3) deprived Plaintiffs of their property without due  
3 process in violation of 42 U.S.C. § 1983. ECF No. 10.

4 Defendant Chelan County Fire District No. 6 moves for summary  
5 judgment, arguing that the first Amended Complaint cannot relate back to the  
6 original complaint because the Fire District did not receive notice of the action  
7 within the statutory period, or have knowledge that, but for a mistake in its  
8 identity, Plaintiffs would have added it to the action. ECF No. 15. In addition, the  
9 Fire District argues that Plaintiffs' failure to ascertain its identity constitutes  
10 "inexcusable neglect" because Plaintiffs did not attempt to obtain public records  
11 to discover all relevant parties. *Id.* Plaintiffs disagree and argue the Fire District  
12 had notice of the action; should have known that, but for a mistake, Plaintiffs  
13 would have added it to the action before the statutory period expired; and  
14 Plaintiffs' failure to timely file a complaint against the Fire District does not  
15 constitute inexcusable neglect. ECF No. 24.

## 16 **II. ANALYSIS**

### 17 **A. Summary Judgment Standard**

18 The Court shall grant summary judgment in favor of a moving party who  
19 demonstrates that "there is no genuine dispute as to any material fact and the  
20 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The

1 party moving for summary judgment bears the initial burden of showing the  
2 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
3 317, 323 (1986). The burden then shifts to the nonmoving party to identify  
4 specific facts showing there is a genuine issue of material fact. *Anderson v.*  
5 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla  
6 of evidence in support of the plaintiff’s position will be insufficient; there must be  
7 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

8 A fact is material if it could affect the outcome of the suit under governing law. *Id.*

9 A dispute involving such facts is genuine when a reasonable jury could find in  
10 favor of the non-moving party. *Id.* The Court determines if a fact is material by  
11 viewing it in the light most favorable to the nonmoving party. *Young v. United*  
12 *Parcel Service, Inc.*, 135 S.Ct. 1338, 1347 (2015).

### 13 **B. Washington Law Governs Relation Back**

14 Motions based on procedural issues that arise prior to the case’s removal to  
15 federal court are governed by state law. *Anderson v. Allstate Ins. Co.*, 630 F.2d  
16 677, 682 (9th Cir. 1980). Accordingly, Washington law governs whether  
17 Plaintiffs’ first Amended Complaint relates back to the original complaint because  
18 Defendants removed the action to this Court after Plaintiffs first served the Fire  
19 District. Therefore, this Court applies Washington State Superior Court Civil Rule  
20 15(c) and not Federal Rule of Civil Procedure 15(c)(1).

1 **C. Relation Back Standard**

2 The statute of limitations period for Plaintiffs' state law and 42 U.S.C. §  
3 1983 actions is three years. RCW 4.16.080(2); *See also City of Monterey v. Del*  
4 *Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 691 (1999) (explaining that all §  
5 1983 actions should be characterized as personal injury tort actions). For an  
6 amended pleading to relate back under Washington law, the plaintiff must prove  
7 the defendant "has (1) received such notice of the institution of the action that the  
8 added party will not be prejudiced in maintaining her or his defense on the merits,  
9 and (2) knew or should have known that, but for a mistake concerning the identity  
10 of the proper party, the action would have been brought against the new party."  
11 CR 15(c); *Martin v. Dematic*, 182 Wn.2d 281, 288-89 (2014).

12 In addition to CR 15(c)'s textual requirements, Washington does not permit  
13 an amended complaint to relate back if the delay was due to "inexcusable  
14 neglect." *Id.* at 288-91. The defendant bears the initial burden of producing  
15 evidence that shows its identity "was easily ascertainable by the plaintiff." *Martin*,  
16 182 Wn.2d at 291. Upon meeting this burden, the plaintiff then must prove he had  
17 "a reasonable excuse or . . . exercised due diligence" in determining the  
18 defendant's identity before the statute of limitations expired. *Id.*

19 Here, even if Plaintiffs can meet CR 15(c)'s textual requirements, their  
20 failure to timely amend the complaint constitutes inexcusable neglect.

1           1.     Textual requirements

2           First, the defendant must have had prior notice of the lawsuit so it would  
3 not be prejudiced if joined to the action. CR 15(c)(1); *Kommavongsa v. Haskell*,  
4 149 Wn.2d 288, 317 (2003). In determining prejudice, the Court considers  
5 whether the amended pleading is the result of undue delay, unfair surprise, or if it  
6 would be an exercise in futility. *Watson v. Emard*, 165 Wn. App. 691, 699 (2011).  
7 Here, the Fire District contends it did not know about Plaintiffs' action against  
8 Chelan County and the Sherriff's Office before the statute of limitations expired  
9 on July 30, 2013. ECF No. 15 at 5. However, Chief Mosher spoke with Sergeant  
10 Sisson about the Plaintiffs' lawsuit several times before 2013. ECF No. 31-1 at 8-  
11 9. Under these circumstances, the Court does not find that the Fire District faces  
12 prejudice as a result of lacking prior notice of the action.

13           Second, the defendant must have "kn[own] or should have known that, but  
14 for a mistake concerning the identity of the proper party, the action would have  
15 been brought against [it]." CR 15(c)(2); *Martin*, 182 Wn.2d at 288-89. The Fire  
16 District argues it did not know that, but for a mistake of its identity, the action  
17 would have been brought against it. However, Chief Mosher acted as "Incident  
18 Command" during the fire, ECF No. 17 at 2-3, and made the request to RiverCom  
19 dispatch to have the Sheriff's Office establish the roadblock at the bottom of  
20 Nahahum Canyon Road. ECF No. 27-1 at 9. Chief Mosher also made the decision



1 to have the Sheriff's Office allow "no one up unless fire units or aid." ECF No. 16  
2 at 6. In addition, Sergeant Sisson of the Sheriff's Office informed Chief Mosher of  
3 Plaintiff's initial arrival at the roadblock and Chief Mosher responded that  
4 Plaintiff should not be granted access to pass because "it was a critical time in the  
5 fire." ECF No. 27-1 at 11. Finally, Chief Mosher spoke with Sergeant Sisson  
6 about the instant lawsuit several times. ECF No. 31-1. Chief Mosher's  
7 involvement with the roadblock's creation, his decision to deny Plaintiff access to  
8 his property, and his discussions with Sergeant Sisson about Plaintiffs' lawsuit  
9 indicate the Fire District knew that, but for a mistake, Plaintiffs would have  
10 brought an action against it.

11 2. Inexcusable neglect

12 A defendant may only be added to an action after the statute of limitations  
13 expires if the "delay was not due to inexcusable neglect." *Martin*, 182 Wn.2d at  
14 290. If the defendant's identity was readily available during the statute of  
15 limitations from public sources or upon a reasonable investigation, the failure to  
16 ascertain the defendant's identity constitutes inexcusable neglect. *Haberman v.*  
17 *Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174 (1987). A court will find  
18 inexcusable neglect where "the information necessary to properly implead the  
19 parties was readily available . . . [and the] attorney simply did not inquire." *S.*  
20 *Hollywood Hills Citizens Ass'n for Pres. of Neigh. Safety and Env't v. King*

1 County, 101 Wn.2d 68, 78 (1984). The defendant holds the initial burden of  
2 showing its identity was readily available. *Martin*, 182 Wn.2d at 290-291. If the  
3 defendant produces sufficient evidence, the burden shifts to the plaintiff who must  
4 “give a reason for failing to ascertain the identity of the defendant.” *Id.*<sup>2</sup> However,  
5 “delay due to ‘a conscious decision, strategy or tactic’ constitutes inexcusable  
6 neglect.” *Segaline v. State, Dept. of Labor and Industries*, 169 Wn.2d 467, 477  
7 (2010) (quoting *Stansfield v. Douglas Cnty.*, 146 Wn.2d 116, 121) (finding  
8 inexcusable neglect where plaintiff amended complaint nine months after learning  
9 defendant’s identity).

10 i. Whether the Fire District’s identity was readily available

11 First, the Fire District must show its identity was readily available. Here,  
12 because the Fire District’s identity and role in the fire was ascertainable from  
13 public records, Defendant’s burden has been met. The pleadings demonstrate (1)  
14 Chelan County’s Communication Log from the fire show that Chief Mosher  
15 established Nahahum Command; (2) DNR’s public records specifically identify  
16 Chief Mosher as the fire’s Incident Command; (3) Defendant Chelan County’s  
17 July 18, 2013 interrogatory response states the Fire District was responsible for  
18 fighting the fire and establishing the roadblock; and (4) Plaintiff knew the Fire

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19 <sup>2</sup> See *Haberman*, 109 Wn.2d at 174 (1987) (finding inexcusable neglect where Defendants’  
20 identities were available in court records and Secretary of State annual reports); *S. Hollywood Hills*, 101 Wn.2d at 77-78 (1984) (finding inexcusable neglect where party failed to check county records).

1 District fought the fire because he asked Chief Mosher to write him a letter  
2 regarding the contents of his storage units on the property. ECF No. 16 at 3-4, 10-  
3 12.

4 Because the Fire District's identity was readily available to Plaintiffs in  
5 DNR's public records, and would have been revealed upon a reasonable  
6 investigation, Plaintiffs acted with inexcusable neglect unless they can advance a  
7 reasonable excuse for failing to ascertain the Fire District's identity. *Martin*, at  
8 291.

9 ii. Whether Plaintiffs had a reasonable excuse for failing to ascertain the  
10 Fire District's identity

11 Plaintiffs did not act with inexcusable neglect if they can offer a reasonable  
12 excuse for failing to discover the Fire District's identity prior to the statute of  
13 limitation's expiration. Plaintiffs cannot do so. Instead, they offer only conclusory  
14 statements that they performed a reasonable investigation and inquiry. ECF No.  
15 28. Mr. McKee admits that on July 30, 2010, he spoke with DNR officials two  
16 times and with "several firefighters" after arriving at the roadblock for the third  
17 time. ECF No. 26 at 3-4. Plaintiffs' assertion that they lacked "information  
18 indicating that any other person or entity was responsible," ECF No. 28, does not  
19 sufficiently explain why they failed to obtain documents available through a  
20 public records request to DNR, or any other public agency involved with the fire.

1 The evidence shows that had Plaintiffs conducted reasonable research, they  
2 could have ascertained the Fire District's identity and amended the complaint  
3 within the statute of limitations. The Fire District has shown its identity was  
4 readily available in various public records, and Plaintiffs have not adequately  
5 explained why they did not investigate these public records, nor do they  
6 meaningfully explain what research was conducted. Finally, even after  
7 discovering the Fire District's connection to their complaint, Plaintiffs waited nine  
8 months before amending the complaint to include the Fire District. As a result,  
9 Plaintiffs' failure to add the Fire District to the action before the statutorily  
10 permissible period expired constitutes inexcusable neglect.

#### 11 **IV. CONCLUSION**

12 Therefore, the Court grants Defendant's motion for summary judgment,  
13 finding the record in this matter demonstrates Plaintiffs' delay in amending the  
14 complaint was due to inexcusable neglect.

15 Accordingly, **IT IS HEREBY ORDERED:**

- 16 **1.** Defendant Chelan County Fire District No. 6's Motion for Summary  
17 Judgment, **ECF No. 15**, is **GRANTED**.
- 18 **2.** **JUDGMENT** is to be entered in Chelan County Fire District No. 6's  
19 favor.  
20

**3.** Defendant's Motion for Summary Judgment Re: Plaintiff's Substantive Claims, **ECF No. 44**, is **DENIED as moot**.

**4. The Clerk's Office is directed to **AMEND** the caption as follows:**

RANDY MCKEE and SHEILA MCKEE, husband and wife,

Plaintiffs,


V.

CHELAN COUNTY, a County existing under Washington Law, and  
CHELAN COUNTY SHERIFF'S OFFICE, a subdivision of Chelan  
County,

Defendants.

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and provide copies to all counsel.

**DATED** this 29th day of June 2015.

  
SALVADOR MENDOZA, JR.  
United States District Judge